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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERTS ORLIKOWSKI, and SCOTT WAY,

Petitioners,

v

CASSENS TRANSPORT CO. and CRAWFORD & COMPANY, foreign corporations, and DR. SAUL MARGULES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

Marshall Lasser
MARSHALL LASSER PC
P.O. Box 2579
Southfield MI 48037
248-647-7722

Counsel for Petitioners
Paul Brown, et al

I

QUESTION PRESENTED FOR REVIEW

MUST A CIVIL RICO COMPLAINT ALLEGING MAIL FRAUD ALSO ALLEGE COMMON LAW FRAUD?

PARTIES TO THE PROCEEDING

Petitioners (defendants and appellees below):

PAUL BROWN, WILLIAM FANALY, CHARLES THOMAS, GARY RIGGS, ROBERT ORLIKOWSKI, and SCOTT WAY

Respondents (plaintiffs and appellants below):

CASSENS TRANSPORT COMPANY and CRAWFORD & COMPANY, foreign corporations, and DR. SAUL MARGULES,

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United States Code:
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18 U.S.C. §§1341, 1343
28 U.S.C. §1332
28 U.S.C. §2101

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418.301
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Michigan Workers Compensation Administrative Rule 408.33

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PAUL BROWN, ET AL, Plaintiffs-appellants v CASSENS TRANSPORT COMPANY, ET AL, Defendants-appellees, United States Court of Appeals for the Sixth Circuit, case no. 05-1843,

AMENDED ORDER filed December 20, 2007
(Denying petition for rehearing en banc)

PAUL BROWN, ET AL, Plaintiffs-appellants v CASSENS TRANSPORT COMPANY, ET AL, Defendants-appellees, United States Court of Appeals for the Sixth Circuit, case no. 05-1843,

ORDER filed December 17, 2007
(Denying petition for rehearing en banc)

PAUL BROWN, ET AL, Plaintiffs-appellants v CASSENS TRANSPORT COMPANY, ET AL, Defendants-appellees, United States Court of Appeals for the Sixth Circuit, case no. 05-1843,

OPINION and JUDGMENT filed July 10, 2007

PAUL BROWN, ET AL, Plaintiffs-appellants v CASSENS TRANSPORT COMPANY, ET AL, Defendants-appellees, United States District Court for the Eastern District of Michigan, case no. 04-72316

ORDER DENYING PLAINTIFFS' MOTION TO AMEND COMPLAINT
July 22, 2005

PAUL BROWN, ET AL, Plaintiffs-appellants v CASSENS TRANSPORT COMPANY, ET AL, Defendants-appellees, United States District Court for the Eastern District of Michigan, case no. 04-72316

MEMORANDUM OPINION AND ORDER
July 15, 2005
JUDGMENT IN FAVOR OF DEFENDANTS
July 18, 2005

IV

BASIS FOR JURISDICTION

1. The amended order of the Court of Appeals denying plaintiff's motion for rehearing en banc was entered December 20, 2007.

2. Jurisdiction to review this writ exists under 28 U.S.C. §2101.

THE STATUTES INVOLVED IN THE CASE

Federal

A. The Racketeer Influenced Corrupt Organization Act (RICO) §18 U.S.C. 1961 and §18 U.S.C. 1962(c).

B. 18 U.S.C. §1341 (mail fraud), 18 U.S.C. §1343 (wire fraud)

State

Michigan Workers Disability Compensation Act, MCL 418.101 et seq, sections 301, 315, 631, 801

STATEMENT OF THE CASE

This case presents a major question arising under the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §1961 et seq (RICO): whether plaintiffs in a civil RICO suit who claim they are victims of mail fraud must also allege common law fraud, even though the government in a criminal RICO case alleging mail fraud need not. The Sixth Circuit injected a pleading requirement - common law fraud - not found in the RICO statute and not found in the mail fraud statute.

RICO §1961(1)(B) provides that "racketeering activity" includes "any act which is indictable" under the mail fraud statute. The Court of Appeals for the Sixth Circuit held in 1984, in *Bender v Southland Corp,* 749 F2d 1205, that a plaintiff in a RICO civil suit claiming mail fraud as a racketeering activity must allege a misrepresentation was made to him by mail upon which he relied, even though the government need not allege misrepresentation and reliance (common law fraud) in a RICO prosecution based on mail fraud. Both the civil and the criminal cases are based on the same RICO and mail fraud statutes, *but the Sixth Circuit in Bender added a pleading requirement not found in either statute.*

In the present case, the District Court granted defendants' motion to dismiss brought under Fed. R. Civ. Proc. 12(b)(6), citing *Bender* - but the three judge panel indicated plaintiffs' position was legitimate and urged this Court to overrule *Bender.* The panel said it was required to follow Sixth Circuit precedent, absent

reversal by the Sixth Circuit sitting en banc. Plaintiffs' motion for rehearing en banc was denied.

Six other Circuits disagree with *Bender*, all holding that reliance by the target of the scheme is not required in a civil RICO complaint, because RICO does not require the government in a criminal case based on mail fraud to prove reliance by the target. Some of the Circuits have ruled - as plaintiff urges here - that RICO requires only that mail fraud targets allege in their civil suit that they are the direct victims of a scheme to defraud "which is indictable" under 18 U.S.C. §1341 (prohibiting mail fraud). Still other Circuits have held that a RICO mail fraud civil claim is stated when plaintiffs allege they are the direct victims of a misrepresentation made to and relied on by a third person, as part of a scheme to defraud indictable under 18 U.S.C. §1341. If either of these rules rule is adopted by the Court - if the RICO statute is interpreted literally for civil cases, as it is for criminal cases - the decision of the Sixth Circuit in this case must be reversed.

Bender is also incompatible with *Neder v United States*, 527 US 1, 119 S Ct 1827, 144 L Ed 2d 35 (1999), which held that reliance is not required for an act to be indictable under the mail fraud statute.[1]

Recently, this Court decided *Anza et al v Ideal Steel Supply Corp*, 547 US ___ (04-433, June 5, 2006).

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1 Petitioners' arguments throughout this brief are intended to apply to both the mail and wire fraud statutes, 18 U.S.C. §§1341 and 1343, but for brevity petitioners use only the term "mail fraud."

Defendant in that case requested this Court to hold "that a plaintiff may not assert a RICO claim predicated on mail fraud or wire fraud unless it demonstrates it relied on the defendant's misrepresentations." The Court said that because the plaintiff "has not satisfied the proximate-cause requirement articulated in *Holmes* [*v Security Investors Protection Corp*, 503 US 258, 112 S Ct 1311, 117 L Ed 2d 532 (1992)], we have no occasion to address the substantial question whether a showing of reliance is required." *Anza*, id, slip opinion 9.

This "substantial question" is squarely presented in this case.

Justice Thomas did address this question in his dissent in *Anza* and rejected the reliance requirement:

> "I disagree with the conclusion that reliance is required at all. In my view, the mere fact that the predicate acts underlying a particular RICO violation happen to be fraud offenses does not mean the reliance, an element of common-law fraud, is also incorporated as an element of a civil RICO claim." Id, slip opinion, 14.

This petition should be granted because "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court" (SC Rule 10(c)), and because "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter" (SC Rule 10(a)).

Synopsis of This Case

Plaintiffs brought suit in the United States District Court for the Eastern District of Michigan, alleging a civil RICO cause of action authorized by 18 U.S.C. §1964(c). Plaintiffs claimed defendants violated 18 U.S.C. §1962(c) of RICO, which provides in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise... to conduct or participate... directly in the conduct of such enterprise's affairs through a pattern of racketeering activity...

18 U.S.C. §1961 of RICO states:-

> As used in this chapter -
>
> (1) "racketeering activity" means..... (B) *any act which is indictable* under any of the following provisions of title 18, United States Code: .... section 1341 (relating to mail fraud), section 1343 (relating to wire fraud).....[emphasis added]

Plaintiffs are employees of Cassens Transport Company who claim they were injured on the job, entitling them to workers compensation benefits under Michigan's Workers Disability Compensation Act ("WDCA"), Michigan Compiled Laws 418.101 et. seq., from Cassens and from Cassen's claims adjuster, Crawford & Company. The benefits consisted of weekly wage loss checks and payment of

medical care for their injuries.

Plaintiffs filed suit in the District Court, alleging that defendants schemed to fraudulently deprive them of their benefits. Plaintiffs alleged that defendants' scheme used the mails in two ways:

> (1) Crawford, acting in concert with Cassens, mailed fraudulent Notices of Dispute to them and to the Michigan Workers Compensation Agency, which administers the WDCA; the Notice of Dispute is a form which an insurer is required to file with the Agency when it terminates or denies benefits. The Notices of Dispute gave false explanations for the denial or termination of benefits to the plaintiffs.
>
> (2) Crawford, acting in concert with Cassens, obtained and mailed false medical reports from defendant Dr. Margules. Crawford cited these false medical reports in Notices of Dispute as the basis for terminating or denying benefits.

Each of these acts involved mail fraud in violation of 18 U.S.C. §1341. Plaintiffs alleged defendants' fraudulent acts directly and immediately injured them because upon the mailing of the Notices of Dispute Crawford cut off or denied their workers compensation benefits, and caused them attorney expense to recover those benefits.

Plaintiffs alleged defendants targeted them in their scheme, proximately injured them, and used the mails and wires in furtherance of the fraudulent scheme. However, the original complaint did not allege that plaintiffs or anyone else relied on

misrepresentations sent by mail or wire.

Defendants filed a motion to dismiss the original complaint under Rule. 12(b)(6), asserting, inter alia, that plaintiffs failed to plead common law fraud, citing *Bender*, supra.

Before the District Court ruled on the motion to dismiss, plaintiffs moved for leave to file an amended complaint which alleged that defendants, as part of their scheme, made misrepresentations to third parties (the Workers Compensation Agency and its magistrates) upon which the third parties relied, proximately injuring plaintiffs. (Apx 61)

The District Court, relying on *Bender*, granted the motion to dismiss the original complaint. (Apx 27)

After the District Court granted defendants' motion to dismiss, it denied plaintiffs' motion for leave to file the amended complaint. (Apx 26)

The Court of Appeals affirmed the dismissal of the original complaint, citing *Bender*. (Apx 5) It also held that plaintiff failed to appeal the denial of the motion for leave to file the amended complaint.

The panel indicated they would overturn *Bender* and would not require reliance by anyone as long as plaintiffs properly alleged they were proximately injured by defendants' fraudulent scheme, but "absent a clear directive from the Supreme Court or a decision of this court sitting en banc, we are not at liberty to reverse this court's precedent."

Judge Gibbons, writing for the 2-1 majority, noted that in *Systems Management v Loiselle*, 303 F.3d 100 (1st Cir. 2002)

> ...the First Circuit has taken a different approach to civil RICO liability, concluding that RICO's terms "does not require 'reliance' by anyone," id at 104, and holding that "under a literal reading of RICO - the presumptive choice in interpretation - nothing more than the criminal violation and resulting harm is required," id. While we believe the First Circuit's position is legitimate, as a subsequent panel applying the law of this circuit we are not empowered to disregard our own precedent in favor of the views of other circuits.

Judge Ackerman concurred in the 2-1 decision only because *Bender* was binding precedent absent reversal in an en banc review. "I hope that the Sixth Circuit elects, at some point in the future, to consider this issue en banc and reaches what I suggest is the proper conclusion that reliance need not be shown in a civil RICO case based on mail or wire fraud."

Judge Moore in dissent stated,

> Bender was inconsistent with our precedent interpreting the mail and wire fraud statutes when it was decided, and this inconsistency remains today.... To prevent the error begun in *Bender* and extended today from snowballing any further, we should convene the court en banc to reexamine whether a civil RICO claim incorporates the element of reliance. Notably, in a case in which the

> Supreme Court declined to decide whether a showing of reliance is required, *Anza v Ideal Steel Supply Corp*, ___ US ___, 126 S. Ct. 1991, 1998 (2006), the only Justice to address the issue (Justice Thomas) wrote separately to express his conclusion that reliance is not an elemnt of a civil-RICO claim. Id at 2007-2008."

Plaintiffs' motion for rehearing en banc was denied. (Appx 3)

Basis for Federal Jurisdiction in the District Court

Federal question jurisdiction is conferred on plaintiffs' claims by the Federal Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. §1961 et seq (RICO). Diversity of citizenship jurisdiction is conferred by 28 U.S.C. §1332 (plaintiffs are citizens of Michigan, defendants are citizens of other states, and the amounts in controversy exceed $75,000).

ARGUMENT

1. Background and Procedural History

Paul Brown and his co-workers are truck drivers who were injured while working for Cassens Transport Company. They sought Michigan workers compensation benefits from defendants. Crawford & Company adjusted workers compensation claims for Cassens. Defendants denied benefits.

Michigan's workers compensation scheme was established by the Worker's Disability Compensation Act ("WDCA"), Michigan Compiled Laws ["MCL"] §418.101 et. seq.. Section 301(1) of the WDCA provides that an "employee who receives a personal injury arising out of the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in this act." (MCL 418.301(1), Apx 75) Section 315 provides that the employer shall pay the medical expenses of the injury. (MCL 418.315, Apx 75)

Section 801 of the WDCA provides for sanctions against an employer and its insurer if benefits are not paid promptly to the injured employee. However, an insurer may avoid sanctions by filing a Notice of Dispute with the Workers Compensation Agency (the "Agency"). MCL 801.

A claims adjuster seeking to deny or terminate an employee's benefits must file a Notice of Dispute with the Agency (formerly the Bureau of Workers Disability Compensation) and send a copy to the

employee. The manner and method of disputing a claim via a Notice of Dispute is set out in Administrative Rule R408.33:

> (1) On or before the fourteenth day after the employer has notice or knowledge of an alleged injury or death, a carrier... shall notify the bureau, on form 107, if the right of the injured employee or dependant to compensation is disputed.... A copy of form 107, notice of dispute, shall be mailed or given to the injured employee.

A Notice of Dispute form is in the Appendix at 68.

Paul Brown and his co-workers brought suit pursuant to §1964(c) of the federal Racketeer Influence and Corrupt Organization Act ("RICO"), 18 U.S.C. §1961, et. seq.. RICO Section 1964(c) provides in part:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee... (Apx 74)

Plaintiffs alleged defendants fraudulently deprived them of their workers compensation benefits through a "pattern of racketeering activity" in violation of §1962(c), which provides:

> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign

> commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. (Apx 73)

Plaintiffs alleged defendants committed a series of "predicate acts" of "racketeering activity" involving mail and wire fraud in violation of 18 U.S.C. §1961(1) of the RICO statute. §1961(1) defines racketeering activity to include "any act which is indictable" under the mail and wire fraud provisions of title 18 of the United States Code, §§1341 and 1343. (The text of §§1341 and 1343 are in the appendix at 69.)

Mr. Brown and his co-plaintiffs claimed Cassens and Crawford applied this scheme to all of them, as a group. Plaintiffs alleged defendants sometimes employed defendant Dr. Margules to write false medical reports to effect their scheme:

> ALLEGATIONS COMMON TO ALL CAUSES OF ACTION
>
> ***
>
> 5. Decisions regarding paying claims or terminating payment were made jointly by defendants, or were made by Crawford & Company after consulting with Cassens, or were ratified by Cassens after being made by Crawford. These allegations are made on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery. The persons with decision power at Cassens

and Crawford formed an "enterprise" for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO).

6. A. One or more of these persons committed mail fraud, wire fraud and or conspiracy to defraud, in a repeated and continuing pattern, by fraudulently denying benefits. This fraud was accomplished in part by use of the United States mails and by electronic communications in violation of 18 USC 1341 and 1343.... These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

B. This fraud was also accomplished in part by Cassens and Crawford deliberately selecting doctors such as Dr. Saul Margules to get a medical opinion which defendants could use to deny benefits to plaintiff, rather than to get an objective opinion from a qualified specialist to help defendants decide whether plaintiff s were entitled to benefits. Crawford, Cassens and their attorneys knew Dr. Margules was a family doctor who was not trained or certified in orthopedic medicine, although most of the injuries suffered by Cassens employees were within the field of orthopedic medicine, as they involved bones, joints and muscles. Crawford, Cassens and their attorneys knew Margules and other doctors they employed to examine plaintiffs and other drivers were "cut off" doctors, that is, doctors upon whom Crawford and Cassens could rely for opinions

> which they could cite as grounds for cutting off or denying benefits, either by stating plaintiffs were able to work, or, if disabled, their injury was not work related. Doctor Margules and these other doctors had over many years received substantial income from defendants and their attorneys. .... Defendants used electronic and mail communications in furtherance of defendants' scheme of fraud, in violation of 18 USC 1341, 1343 and 1512. This fraud was also accomplished by defendants deliberately ignoring communications from objective doctors, trained in orthopedic medicine and other specialities, indicating plaintiffs did have work-related disabilities. These allegations are based on information and belief, and are likely to have evidentiary support after a reasonable opportunity for investigation and discovery.

In addition to the common allegations based on false medical reports created by Dr. Margules in conspiracy with Cassens and Crawford, plaintiffs made individual allegations. Gary Thomas claimed he submitted to defendants for payment a medical bill arising out of a work-related injury, along with an Attending Physician's Statement declaring that the bill was for the work-related injury; despite having the Physician's Statement, Crawford & Company denied payment on the false ground it had "no medical establishing causation." William Fanaly, a long-haul truck driver like his co-plaintiffs, was injured walking to his truck; he alleged defendants denied his claim on the ground the manner of injury was not work related, even though defendants knew

an injury which occurs when a driver walks to his truck was compensable under Michigan law that had been clear for one hundred years. Paul Brown alleged that defendants refused to pay his work-injury-related medical bills even after a magistrate ordered defendants to pay the medical expenses for his work injury; defendants falsely claimed they were not obligated to pay the bills when in fact they were expressly required by Michigan statute to do so. (Complaint paras 41 and 41A) Gary Riggs alleged Crawford terminated his benefits on the false ground it lacked medical information, when it actually had the information. (Complaints para 48)

Each of the plaintiffs claimed defendants mailed to them and to the Michigan Workers Compensation Agency fraudulent Notices of Dispute. The Notice of Dispute is a form which workers compensation claim adjusters are required to mail to the Agency and to the worker when the adjuster denies or terminates a claim; the form states the adjuster is required to state the grounds for termination or dispute, and warns of the penalty of perjury for filing a false Notice of Dispute (see Appx 68).

Defendants filed motions to dismiss the complaint under civil procedure Rule 12(b)(6), failure to state a claim upon which relief can be granted. The district court on July 15, 2005, issued an opinion and order granting the motion, holding, inter alia, that a civil RICO plaintiff must allege common law fraud.

Before the district court issued its order and opinion but after oral argument on defendants' motion to dismiss, plaintiffs filed a motion under Rule 18 for leave to file a first amended complaint.

The proposed amendments alleged basically that defendants mailed forms, called Notices of Dispute, which the Michigan Workers Compensation Agency requires an employer and its insurer to file with the Agency when they deny a workers compensation claim. Plaintiffs alleged these Notices of Dispute contained misrepresentations on which the Agency and or its Magistrate relied, proximately causing injury to plaintiff. Plaintiff's motion for leave to file an amended complaint was denied by order of July 22, 2005.

On appeal to the Court of Appeals for the Sixth Circuit, plaintiffs raised several grounds. The court addressed only one ground - whether a civil RICO plaintiff must allege common law fraud - and held that he must, citing *Bender,* supra. It affirmed the dismissal. However, the panel unanimously indicated plaintiffs' argument was legitimate and urged this Court to address the issue.

I.

A CIVIL RICO PLAINTIFF WHO ALLEGES VIOLATION OF THE MAIL FRAUD STATUTE SHOULD NOT BE REQUIRED TO ALLEGE HE RELIED ON DEFENDANTS' MISREPRESENTATION MADE TO HIM, WHERE HE ALLEGES OR SHOWS DEFENDANTS' FRAUDULENT SCHEME PROXIMATELY INJURED HIM

The Racketeer Influenced Corrupt Organization Act (RICO) provides at 18 U.S.C. §1962(c), Prohibited Activities:

> (c) It shall be unlawful for any person employed by or associated with any enterprise... to conduct... such enterprise's affairs through a pattern of racketeering activity... (Apx 73)

§1961(1) defines "racketeering activity" to include "any act which is indictable" under the mail fraud statute of title 18 of the United States Code, §1341. Mail fraud is, in the parlance of RICO litigation, a predicate act. A plaintiff is required by §1962(c) to allege a sufficient number of predicate acts of racketeering to form a "pattern of racketeering activity." (Apx 73)

Plaintiffs alleged defendants committed mail fraud in a pattern of racketeering activity, fraudulently depriving them of their workers compensation benefits. They sought a civil remedy under 18 U.S.C. §1964.

Plaintiffs argue their pleadings sufficiently alleged mail fraud because they showed defendants' fraudulent scheme directly deprived them of workers' compensation benefits, and defendants used the mails in furtherance of that scheme. *Plaintiffs need not show the mailings misrepresented anything; innocent mailings in furtherance of a scheme to defraud should be sufficient in a civil RICO action based on the mail fraud statute.*

Alternatively, plaintiffs argue the proposed amended complaint properly alleged predicate acts of mail fraud because it alleged defendants mailed misrepresentations to a third person (the Workers Compensation Agency), which proximately injured them. Plaintiffs assert the misrepresentations need not have been made to them, and they need not have relied on the misrepresentations, as long as the misrepresentations proximately damaged them.

The Sixth Circuit rejected plaintiffs' claims because in 1984 it held the plaintiffs cannot maintain a civil RICO action absent allegations of common law fraud: the plaintiffs must allege defendants made misrepresentations or omissions of material facts to them, and they relied on those misrepresentations or omissions to their detriment, citing *Bender v Southland Corp*, 749 F2d 1205, 1216 (CA 6 1984). Plaintiffs asked the Sixth Circuit to overturn *Bender*, but the court answered:

> This, we are forbidden to do. In the Sixth Circuit, as well as all other federal circuits, one panel cannot overrule a prior panel's published decision. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or

this Court sitting en banc overrules the prior decision.

Plaintiffs now ask this court to overrule the Sixth Circuit rule requiring them to allege common law fraud, because *Bender* conflicts with -

A. the express language of RICO;

B. the remedial purpose of RICO;

C. this Court's statement in *Holmes*, supra, at footnote 19, that a RICO civil suit may be maintained despite the absence of common law fraud where plaintiffs can prove proximate cause; and

D. decisions of other courts of appeal.

A.

THE RICO STATUTE REQUIRES A PLAINTIFF TO ALLEGE AN ACT "INDICTABLE" UNDER THE MAIL FRAUD STATUTE, NOT COMMON LAW FRAUD

The RICO statute does not contain a requirement that plaintiff allege common law fraud. §1961(1) defines "racketeering activity" to include an act "indictable" under18 U.S.C. §1341. This Court has held that common law fraud is not required for an act to be indictable in a prosecution alleging violation of the mail fraud statute. Reliance on a misrepresentation is not required, *Neder v US*, 527 US 1, 119 S Ct 1872, 144 L Ed 2d 35 (1999) ("reliance has no place in a prosecution under the mail or wire fraud statutes").

Nothing in the RICO statute places a higher

burden on plaintiff in a civil suit than is placed upon the government in a prosecution. "As defined in the statute, racketeering activity consists not of acts for which the defendant has been convicted, but of acts for which he could be." *Sedima, S.P.R.L. v Imrex Co, Inc.* 473 US 479, 488; 105 S Ct 3275, 3281; 87 L Ed2d 346 (1985).

Neder, supra, said

> The common law requirements of "justifiable reliance" and "damages," for example, plainly have no place in the federal fraud statutes. See, eg, United States v Stewart, 872 F. 2d 957, 960 (CA 10 1989) ("[Under the mail fraud statute,] the government does not have to prove actual reliance upon the defendant's misrepresentations"); United States v Rowe, 56 F. 2d 747, 749 (CA 2 1932) (L. Hand, J) ("Civilly of course the [mail fraud statute]would fail without proof of damage, but that has no application to criminal liability"), cert denied, 286 US 554, 52 S Ct 579, 76 L Ed 1289 (1932). *Neder*, supra, 527 US at 24.

The language of 18 U.S.C. §1841 contemplates that a misrepresentation to the plaintiff is merely one avenue for violating the statute. The language is in the disjunctive, and permits schemes not involving misrepresentation, such as those alleged by Mr. Brown and his co-plaintiffs:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, ***or*** for obtaining money or property by means of false or fraudulent

pretenses, representations or promises..."

Bender, supra, demands plaintiff allege more than the RICO and mail fraud statutes require. *Bender* conflicts with the express language of the statute and should be reversed.

Justice Thomas, dissenting in *Anza*, supra, wrote that reliance should not be required in a civil RICO case based on mail fraud because reliance is not an element in the RICO statute:

> ....I must proceed to the question which the Court does not reach: whether reliance is a required element of a RICO claim predicated on mail or wire fraud, and if it is, whether that reliance must be by the plaintiff. The Court of Appeals held that reliance is required, by that "a RICO claim based on mail fraud may be proven where the misrepresentations were relied on aby a third person rather than the plaintiff." 373 F. 3d. At 262-263. I disagree with the conclusion that reliance is required at all. In my view the mere fact that the predicate act underlying a particular RICO violation happens to be fraud offenses does not mean that reliance, an element of common-law fraud, is also incorporated as an element of a civil RICO claim.
>
> Petitioners are correct that the common law generally required a showing of justifiable reliance before a plaintiff could recover for damages caused by fraud. See *Neder v United States*, 527 U.S. 1, 24-25 (1999); Prosser &

Keeton, §105, at 728. But RICO does not confer on private plaintiffs a right to sue defendants who engage in any act of common-law fraud; instead, racketeering activity includes, as relevant to this case, "any act which is indictable under [18 U.S.C.§]1341 (relating to mail fraud) [and §]1343 (relating to wire fraud." §1961(1) (2000 ed., Supp III). And we have recognized that these criminal fraud statutes "did not incorporate *all* the elements of common-law fraud." *Neder*, 527 U.S. at 24. Instead, the criminal mail fraud statute applies to anyone who "having devised or intending to devise any scheme or artifice to defraud... for the purpose of executing such scheme or artifice or attempting to do so, places in any post office... any matter or thing whatever to be sent or delivered by the Postal Service..." §1341. See §1343 (similar language for wire fraud). We have specifically noted that "[b]y prohibiting the 'scheme to defraud,' rather than the completed fraud, the element of reliance....would clearly be inconsistent with the statute Congress enacted." *Id*, at 25.

Because an individual can commit an indictable act of mail or wire fraud even if no one relies on his fraud, he can engage in a pattern of racketeering activity, in violation of §1962, without proof of reliance. Accordingly, it cannot be disputed that the Government could

> prosecute a person for such behavior. The terms of §1964(c)(2000ed) which broadly authorize suit by "[a]ny person injured in his business or property by reason of a violation of section 1962," permit no different conclusion when an individual brings a civil action against such a RICO violator. *Id*, 14-15.

In this case, two of the three panel members expressly agreed with plaintiffs that the RICO statute does not require reliance as an element of a civil suit predicated on mail fraud. The third panel member appeared to agree, in footnote 3: "While we believe the First Circuit's position [in *Systems Management Inc v Loiselle*, 303 F. 3d 100, 104 (CA 1 2002), concluding that RICO's terms "does not require 'reliance' by anyone"] is legitimate, as a subsequent panel applying the law of this circuit we are not empowered to disregard our own precedent in favor of the views of other circuits."

This court should create uniformity among the circuits by holding that a civil RICO claim based on mail fraud does not require proof of reliance by anyone. A civil claim requires only what the statute requires - proof of an act indictable under the mail fraud statute.

B.

CONGRESS' COMMAND THAT THE RICO STATUTE SHALL BE "LIBERALLY CONSTRUED TO EFFECTUATE ITS REMEDIAL

PURPOSE" IS AN IMPORTANT REASON TO REJECT *BENDER'S* RULE REQUIRING A PLAINTIFF TO ALLEGE COMMON LAW FRAUD

Congress directed that RICO "shall be liberally construed to effectuate its remedial purposes," §904(a) of Pub. L. No 91-452, 84 Stat. 947, 18 U.S.C. §note. "Indeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in §1964, where RICO's remedial purposes are most evident." *Sedima,* supra, 473 US at 491 n. 10; 105 S Ct 3283 n. 10; 87 L Ed 2d at 356 n. 10. "The statute's remedial purposes are nowhere more in evidence than in the provision of a private action for those injured by racketeering activity." *Sedima,* supra, 473 US at 498, 105 S Ct at 3286, 87 L Ed 2d at 360. *Bender's* restriction of private actions conflicts with *Sedima's* encouragement of private actions.

The statute was intended to reach not only mobsters, the Court said in *Sedima*, but also legitimate businesses which scheme dishonestly. "Indeed, the Supreme Court has consistently struck down efforts by the courts of appeals to narrow RICO's scope." *Tabas v Tabas,* 47 F3d 1280, 1297 (CA 3 1995).

C.

THIS COURT INDICATED IN FOOTNOTE 19 OF *HOLMES*, SUPRA, THAT RELIANCE BY A PLAINTIFF ON A MISREPRESENTATION MADE TO HIM WAS NOT REQUIRED IF HE PROVED HE WAS PROXIMATELY

INJURED BY DEFENDANT'S FRAUD

Proximate cause is the key. *Holmes* required direct injury before a person could bring a RICO claim, and indicated that once the direct injury requirement was satisfied, the victim of a fraudulent scheme should be able to allege violation of the mail and wire fraud statutes.

In *Holmes*, the Securities Investor Protection Corporation (SIPC), and trustees appointed to liquidate the securities of a bankrupt broker which was an SIPC member, First State Securities Corporation (FSSC), brought suit against Robert Holmes Jr, claiming he participated in a fraudulent scheme leading to the demise of FSSC, which caused SIPC to advance $13 million to cover the claims of FSSC's customers. The suit claimed Holmes violated the mail and wire fraud statutes, and that the acts of Holmes and his co-conspirators amounted to a pattern of racketeering under RICO. The district court dismissed the claims of the SIPC and the trustees on the ground, inter alia, that plaintiff had not satisified the proximate cause requirement under RICO. The United States Court of Appeals for the Ninth Circuit reversed and remanded. This court granted Holmes' petition on the issue "whether SIPC had a right to sue under RICO."

This court noted that a RICO plaintiff must show that defendant's violation was a proximate cause of his injury. The court fleshed out this term of legal art:

> Here we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the

> consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Low of Torts, §41, P. 264 (5th ed. 1984). Accordingly, among the many shapes this concept took at common law, see *Associated General Contractors [of Cal., Inc. V Carpenters,* 459 US 519, 529 (1983)], supra, at 532-533, was a demand for some direct relation between the injury asserted and the injurious conduct alleged. *Holmes*, supra, 503 US at 262

Holmes applied this concept to deny SIPC and the trustees the right to sue under RICO, holding that "the link is too remote" between the actions of the alleged conspirators and the harm suffered by the customers of the defunct brokerage, FSSC. The acts of defendants did not result in a "direct injury" to the customers. These customers, in whose shoes SIPC stood, were "secondary victims" of the conspiracy, and their damages were at best very difficult to assess because of their remoteness in the chain of causation between the conspiracy and their loss. Of critical importance to this case is footnote 19 of *Holmes,* which indicates that a scheme such as Mr. Brown and his co-plaintiffs allege may meet both the proximate cause and pleading requirements of RICO, even though common law fraud is not alleged .

> We further note that SIPC alleged in the courts below that, in late May 1981, Joseph Lugo, an officer of FSSC and

one of the alleged conspirators, parked manipulated stock in the accounts of customers, among them Holmes, who actively participated in the parking transaction involving his account. See Statement of Background and Facts, 1 App. 223-225. Lugo "sold" securities owned by FSSC to customers at market price, and "bought" back the same securities some days later at the same price plus interest. Under applicable regulations, a broker dealer must discount the stock it holds in its own account, see 17 CFR § 240.15c3-1(c)(2)(iv)(F)(1)(vi) (1991), and the sham transactions allowed FSSC to avoid the discount. But for the parking transactions, FSSC would allegedly have failed capital requirements sooner; would have been shut down by regulators; and would not have dragged Sebag with it in its demise. 1 App. 231. Thus, their customers would have been injured to a lesser extent. *Id.*, at 229, 231. *We do not rule out that, if, by engaging in the parking transactions, the conspirators committed mail fraud, wire fraud, or "fraud in the sale of securities," see 18 U.S.C. §§ 1961(1)(B) and (D) (1988 ed., Supp. I), the broker dealers' customers might be proximately injured by these offenses.* See, *e. g., Taffet* v. *Southern Co.*, 930 F. 2d 847, 856-857 (CA11 1991); *County of Suffolk* v. *Long Island Lighting Co.*, 907 F. 2d 1295, 1311-1312

> (CA2 1990). However this may be, SIPC in its brief on the merits places exclusive reliance on a manipulation theory, and is completely silent about the alleged parking scheme. [emphasis supplied]

The cited pages of *County of Suffolk* and *Taffet* approved RICO mail fraud complaints which did not allege common law fraud. In those cases, utility customers alleged utility officers made fraudulent representations in rate proceedings before state commissions, thereby causing unwarranted rate increases. *The courts of appeal held the customers alleged proximate cause, even though no misrepresentations were made to them by defendants.*

Bender, which restricts RICO mail fraud claims to common law fraud, conflicts with *Holmes'* approval of *County of Suffolk* and *Taffet*. Footnote 19 of *Holmes* indicates that plaintiffs who plead an injury proximately caused by defendants' fraudulent scheme, have properly *Holmes* indicates, plead a civil RICO cause of action even if they have not relied on a misrepresentation made to them.

D.

THE RULING OF THE SIXTH CIRCUIT CONFLICTS WITH THE DECISIONS OF SEVEN OTHER CIRCUITS

1. The Rule of the First, Third, Eighth, Ninth and Eleventh Circuits

Several courts of appeal have held that a civil RICO suit alleging mail fraud does not require plaintiff to allege defendant committed an act of common law fraud, but that he allege only that defendant committed an act indictable under 18 U.S.C. §1341 which proximately injured him. Noting the broad reach of RICO, at least three circuits have held that a scheme may constitute civil RICO mail fraud it even if it does not involve *any* mailed misrepresentation, as long as plaintiff can show defendants' dishonest scheme proximately caused him loss, and the mails were used in furtherance of the scheme:

> In *Systems Management, Inc, v Loiselle*, 303 F 3d 100, 104 (CA 1 2002), plaintiff janitorial workers alleged that Loiselle, owner of a competing janitorial company, paid his workers less than the required prevailing wage to clean offices in a college, and that Loiselle falsely represented to the college that he paid the required wage. Plaintiffs filed a civil RICO case claiming they lost employment due to defendant's fraudulent scheme, which included mail fraud. Loiselle asserted he was entitled to dismissal because plaintiffs had not pled reliance on the misrepresentations. The First Circuit rejected the argument:
>
> > It is true that at common law, a civil action for fraud ordinarily requires proof that the defrauded plaintiff relied upon the deception, and some courts have imported this requirement into RICO actions where the predicate acts comprise mail or wire fraud. But RICO bases its own brand of civil liability

> simply on the commission of specified criminal acts - here, criminal fraud - so long as they comprise a "pattern of racketeering activity"; and criminal fraud under the federal statute does not require 'reliance' by anyone; it is enough that the defendant sought to deceive, whether or not he succeeded. See *Neder v United States*, 527 US 1, 119 S Ct 1872, 144 L Ed 2d 35 (1999). ("The common-law requirement[] of 'justifiable reliance' has no place in the federal fraud statutes.")
>
> ...Congress structured its civil remedy to allow recovery for harm caused by defined criminal acts, including violation of section 1341; and, as noted, the federal mail fraud statute does not require reliance. Thus, under a literal reading of RICO – the presumptive choice in interpretation – nothing more than the criminal violation and resulting harm is required.
>
> ***
>
> ...There is no good reason her to depart from RICO's literal language by importing a reliance requirement into RICO. *Id*, 303 F3d 104

Abels v Farmers Commodities Corp, 259 F 3d 910, 918 (CA 8 2001): "A plaintiff may, but need not, allege that a defendant made misrepresentations of fact. [citation] Because misrepresentations of fact are not necessary to the offense, it follows that no misrepresentations need by transmitted by mail

or wire; even routine business communications in these media may suffice to make a scheme of false dealing into a federal offense." *Id*, 918.

- *Schreiber Distributing v Serv-Well Furniture Co*, 806 F2d 1393, 1400 (CA 9 1986): Plaintiffs must show "(1) The defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the US mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud... This is consistent with the purpose of the statutes, which is to proscribe the use of the mails or wires in any situation where it is closely entwined with fraudulent activity."
- In *Tabas v Tabas*, 47 F3d 1280, 1294 (CA 3 1995), defendants were executors of an estate. The Third Circuit held that each time defendants made a questionable charge or received compensation to which they were not entitled, they committed acts of mail fraud. Citing *Schmuck v United States*, 489 US 705, 715, 109 S Ct5 1443, 1450, 103 L Ed 2d 734 (1989), the court held that completely innocent mailings in furtherance of this fraud can supply the mailing element in a RICO claim based on 18 U.S.C. §1341.
- *Taffett v The Southern Co*, 930 F. 2d 847 (CA11 1991) - cited with approval by this court in *Holmes*, supra, at footnote 19 - involved a claim that a utility fraudulently overstated its expenses and understated its income so that it could obtain higher rates from the state Public Service Commission. Several utility customers

filed a civil RICO claim, alleging defendant used the mails in furtherance of this fraudulent scheme. The court of appeals did not squarely address whether common law fraud was an element of a civil RICO claim; it simply held that use of the mails in service of the fraud is sufficient to state a claim:

> To state a claim under RICO, the plaintiffs must allege that the defendants engaged in racketeering activity which is defined under Sec. 1961(1) of RICO to mean specified predicate acts, including mail fraud and wire fraud. The plaintiffs in both cases at bar have alleged use of the mail to perpetuate the fraud. *Supra*, at 856.

This Court should adopt the rule of these courts and hold that a mailed misrepresentation is not a required element of a civil RICO mail fraud claim. A plaintiff's pleadings should suffice where he alleges or shows a fraudulent scheme proximately caused him damage, and the mails were used in furtherance of the scheme. *Sedima's* injunction that RICO's civil action provision be liberally construed ordains such pleadings, and such pleadings satisfy *Holmes'* requirement that defendants' acts proximately harmed the plaintiff.

Mr. Brown and his co-plaintiffs' pleadings meet the requirements of the rule enunciated by the Eighth, Ninth, and Third Circuits, because they alleged Cassens and Crawford & Company cut off their benefits under false pretenses (claiming they had no proof of disability when they did, or obtaining false medical reports which said a plaintiff was not

disabled when he was); (2) defendants mailed the Notices of Dispute and the medical reports in furtherance of the scheme; and (3) defendants' scheme directly deprived them of their workers compensation benefits and caused them attorney fee expense.

Plaintiffs' pleadings also satisfied this Court's concern, expressed in *Holmes,* supra, that a civil plaintiff plausibly allege he was directly damaged by defendant's fraud. Plaintiffs alleged they were the direct target of defendants's scheme, and that defendants directly injured them by cutting off or denying their benefits and causing them the expense of hiring an attorney to recover their benefits. Plaintiffs alleged proximate cause.

2. The Rule of the Second, Fourth, and Fifth Circuits

Other circuits have required a plaintiff claiming mail fraud to allege or show a mailed misrepresentation, but have held a mailed misrepresentation to a third person was sufficient.

County of Suffolk v Long Island Lighting Co, 907 F. 2d 1295 (CA 2 1990) involved false testimony to public utility commission by a utility official which resulted in commission approval of higher rates. The court held utility customers stated a civil RICO claim if proximate cause is present ("the RICO pattern or acts proximately cause a plaintiff's injury if they are a substantial factor in the sequence of responsible causation"), supra at1311. This Court cited this holding with approval in footnote 19 in *Holmes*, supra.

The Fifth Circuit held a plaintiff sufficiently alleged RICO mail fraud where the false statements

were directed not to him but to customers in the marketplace in which he competed, which the customers relied on to the damage of plaintiff. *Procter & Gamble Company v Amway Corp*, 242 F3d 539, 546-5 (CA 5 2001). Plaintiff alleged Amway Corporation lured away its customers by spreading false rumors that it was linked to Satanism. The court held this pleading sufficient:

> ....a target of a fraud that did not itself rely on the fraud may pursue a RICO claim if the other elements of proximate causation are present. *Procter & Gamble*, supra, 565.

See also *Mid Atlantic Telecom, Inc v Long Distance Services, Inc*, 18 F 3d 260, 263 (CA 4 1994).

The proposed amended pleadings of plaintiffs' are sufficient under *Procter & Gamble*, *Summit*, and *Atlantic Telecom*. They alleged or showed they were proximately injured by defendants' fraud, even though the misrepresentations were made to the Workers Compensation Agency and not to them.

The false statements contained in the Notices of Dispute issued by Crawford & Company were directed to officials of the Michigan Workers Compensation Agency. The statements misled the Agency as to the basis for defendants' cut-off of benefits. Crawford & Company falsely and repeatedly represented to the Agency that there was a proper basis for the denial of plaintiffs' benefits.

The false statements proximately injured plaintiffs. Because the Notices of Dispute did not tell the Agency the true and improper reasons for the cut-offs of benefits, the Agency took no action against defendants, and defendants were able to continue

wrongfully withholding benefits.[8] Under *Procter & Gamble, Mid Atlantic Telecom* and *Systems Management,* Crawford & Company's false statements to the Agency fulfill the misrepresentation requirement in a RICO claim of mail fraud.

However, the decisions of the Second, Fourth and Fifth Circuits are not compatible with this Court's rulings insofar as they *require* reliance on a misrepresentation by a third person. Reliance on a misrepresentation is not a requirement of the mail fraud statute. *Neder*, supra, said so. "The common law requirements of "justifiable reliance" and "damages," for example, plainly have no place in the federal fraud statutes." *Neder*, supra, 527 US at 24.

The text of the RICO statute is instructive on the issue of whether reliance or a mailed false statement are requirements of a civil action. Section 18 U.S.C. §1851 states

"racketeering activity" means..... (B)

8

8 Plaintiffs claim that had the Notices of Dispute told the truth - for example, "Crawford & Company is stopping Paul Brown's benefits on the ground it has no proof of disability although it does have proof of disability" - the Agency would have taken action under §631(1) of the WDCA, MCL 418.631(1), which provides for revoking an insurer's Michigan license "if any insurer licensed to transact the business of workmen's compensation insurance within this state.... unreasonably fails to pay promptly claims for compensation for which it shall become liable." (Apx 76) The Agency could also have taken action against Crawford under the penalty provision of §801 of the WDCA, MCL 418.801. Note also that the Notice of Dispute warns at the bottom of the form that "[m]aking a false or fraudulent statement for the purpose of... *denying benefits* can result in criminal or civil prosecution, or both..." and cites WDCA sections 801 and 631, as well as rule R408.33. (Apx 68)

> any act which is indictable under any of the following provisions of title 18, United States Code: .... section 1341 (relating to mail fraud), section 1343 (relating to wire fraud).....

Congress did not say that a plaintiff in a civil suit must allege more than the government is required to allege in a prosecution. Congress said a plaintiff must allege an "act which is indictable." Because the government in a mail fraud prosecution is not required to allege either reliance, *Neder*, supra, or a mailed misrepresentation, *Schmuck,* supra, neither are plaintiffs in their civil suit.

This Court should rule that a civil RICO plaintiff has sufficiently plead a cause of action where he has alleged or showed defendants' fraudulent scheme directly caused him loss, and defendants used the mails or wires in furtherance of the scheme. Such a rule complies with the holdings of this court in *Neder*, *Schmuck*, *Sedima*, and *Holmes*, supra.

RELIEF REQUESTED

Paul Brown and his co-plaintiffs request this court to hold their Complaint and First Amended Complaint alleged civil RICO causes of action for mail and wire fraud against Cassens and Crawford & Company, and to reverse the dismissal entered by the trial court and affirmed by the court of appeals.

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Marshall Lasser
Attorney for petitioners